2004

Civility in Litigation: How Can the Profession Promote and Enforce Good Behavior?

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VOLUME I SPRING 2004 NUMBER 1

INDIANA CIVIL LITIGATION REVIEW

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CIVILITY IN LITIGATION: SOME THOUGHTS ON THE NATURE OF CIVILITY AND HOW THE PROFESSION CAN PROMOTE AND ENFORCE GOOD BEHAVIOR

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This essay emanates from a talk that was given to the Defense Trial Counsel of Indiana at its annual meeting's luncheon. The good thing about talking about civility, particularly at lunch, is that no one dare heckle or throw food.[1] Beyond the obvious constraints against rude behavior inherent in the medium, we sense a genuine openness to the topic. Defense counsel, in particular, feel besieged by what they perceive to be uncivil behavior, and welcome affirmation about the nature of the problem and some suggestions for solutions. More generally, one can argue that the lack of civility in legal culture signals a crisis for the profession as a whole[2]—a crisis that has the potential to undermine our goals and values.

Civility is more than just good manners or strict adherence to legal norms. Someone can be rigidly correct and technically unassailable in her conduct and still be uncivil. Civility includes ethics, adherence to professional norms, and polite behavior, but it also involves intangibles, behavior that is hard to codify or enforce. In the legal profession, civility includes everything from returning phone calls, to integrity in dealing with opposing counsel and third parties, to common courtesy, to broad "respect for the legal process itself."[3] In the context of discovery, civility might mean respect for witnesses and opposing counsel, reasonable, complete attention to deadlines, and prompt responses to interroga-

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[1] Professor Orenstein wishes to thank her colleague, Hannah Buxbaum, for this reassuring observation made immediately before the luncheon presentation.

[2] We use the word "crisis" with some trepidation, and also with awareness that "[c]rises in the profession do not just happen; they are 'created' and marketed by particular segments of the bar hoping to mobilize their colleagues to deal with what are perceived to be pressing problems. . . . [T]he marketing of crisis is part of an ongoing competition for status, prestige, and recognition that marks all social groups." Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 810 (1998).

[3] Charles M. Kidd & Greg N. Anderson, *Survey of the Law of Professional Responsibility*, 33 IND. L. REV. 1365 (2000).

tories. However one defines it, civility is crucial in the day-to-day relationships among lawyers, clients, witnesses, and judges.[4]

Concerns about the decline of civility are not unique to the legal profession.[5] One need not even subscribe to cable to encounter outrageous language, coarse discourse, and rude behavior in our culture at large. Our society suffers from a politeness deficit, where communication is often conducted with and by machines rather than people, and where the rare instances of person-to-person contact are often rude and inarticulate. Telemarketers have destroyed much of what was left of the peaceful dinner hour, which has been, in any case, transformed for many of us into fast food "enjoyed" while driving. E-mails are curt and phone calls ending in midsentence are no longer presumed to be irate hang-ups, but normal battery drain. We drive angrily and in a hurry. In the words of George Eliot: "Leisure is gone."[6] Inevitably, all of these cultural facts are bound to affect us. As lawyers, we are creatures of the culture we live in, and, inescapably, we express its values.

There is reason to believe, however, that the contagion of incivility is especially acute in law.[7] While the rise in incivility is not a purely recent phenomenon[8] —indeed, then-Chief Justice Burger remarked in 1971 that "overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how

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[4] In terms of these day-to-day interactions, civility might also be perceived as "the sum of the many sacrifices we are called to make for the sake of living together." STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY, 11 (1998).

[5] *See, e.g.*, ARN TIBBETTS & CHARLENE TIBBETTS, WHAT'S HAPPENING TO AMERICAN ENGLISH? 179 (1978): "As our public rhetoric becomes more churlish and illogical; as our plays, movies, and works of fiction become more slovenly, violent, and dirty; as our scholarship becomes more pretentious and inaccurate, so our American spirit loses its magnanimity and grows weak and meanspirited." (Quoted by Bryant Garner usage tip of the day at: http://www.oup.com/us/apps/totd/usage/.).

[6]

> Leisure is gone—gone where the spinning-wheels are gone, and the pack-horses, and the slow wagons, and the peddlers, who brought bargains to the door on sunny afternoons. Ingenious philosophers tell you, perhaps, that the great work of the steam-engine is to create leisure for mankind. Do not believe them: it only creates a vacuum for eager thought to rush in. Even idleness is eager now—eager for amusement; prone to excursion-trains, art museums, periodical literature, and exciting novels; prone even to scientific theorizing and cursory peeps through microscopes.

GEORGE ELIOT, ADAM BEADE Book Six, Chapter LII, Adam and Dinah

[7] *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

[8] Indeed, such a crisis might have been foreordained by the American experiment more generally. Alexis de Tocqueville wrote in 1840, "as the distinctions in rank are obliterated, as men differing in education and in birth meet and mingle in the same places of resort, it is almost impossible to agree on the rules of good breeding." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 460 (Modern Library 1981). *See also* Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305. In this sense, and if we view the earlier periods of American legal culture as defined by exclusion (by gender, race, and to a lesser extent class), the opening up of the profession in the twentieth century to all citizens may have led to an inevitable "crisis" in civility. *See generally* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); RICHARD L. ABEL, AMERICAN LAWYERS (1989).

thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters"[9]—it is apparent that civility has increasingly declined and that we have witnessed destabilization in the "norms of professionalism."[10]

To belabor the obvious for just a paragraph, civility has many important benefits. Everyone's blood pressure is lowered and lawyers' quality of life is enhanced. Attorneys' image in the larger community is improved. Time is saved. Because time is money, clients' money is saved. Civility is good for justice. As Justice Sandra Day O'Connor explained, our system of justice "cannot function effectively when the professionals charged with administering it cannot even be polite to one another."[11] Civility in the profession may reinforce and strengthen citizens' support for the rule of law. At a minimum, it is clear that the rhetorical hyperbole and "petulant grousing"[12] that accompany the images and messages of the legal profession in the popular news of this country have diminished citizens' trust in the system. Such an erosion of confidence in the rule of law has negative consequences for all parts of society.

Various explanations have been offered for the decline in lawyer civility. One oft-cited explanation is that law has been transformed from a profession to a business obsessed with the bottom line.[13] The pressure comes directly from clients, the attorney's sense of duty, and the attorney's concept of self. Another explanation for the lack of civility is the adversarial nature of the legal profession, particularly in litigation, where incivility seems most acute.[14] In this formulation, observers see the problem of civility as "endemic to the adversary system,"[15] where "gamesmanship [i]s the norm,"[16] and where lawyers are excused "from common moral obligations to nonclients."[17]

Judge Sarah Evan Barker, of the Southern District in Indiana, in an insightful article, points to the loss of ritual in litigation as a potential source of incivility. The fast tracks, mediations, arbitrations, and so forth that often replace the grandeur of a full trial, what Judge Barker evocatively calls "the full church

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[9] Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 213 (1971).

[10] *See* Sarat, *supra* note 2, at 811.

[11] Supreme Court Justice Sandra Day O'Connor Addresses the American Bar Association Conference on Civil Justice, Washington, D.C., Dec. 14, 1993, In the News, FEDERAL NEWS SERVICE.

[12] Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

[13] *See, e.g.*, Sarat, *supra* note 2, at 810, 817 (describing the current legal-cultural environment as "one in which market forces threaten to overwhelm the partially anti-market orientations [of the law] that go by the name 'professionalism,'" and one where "profitability is as much a watchword as professionalism."). Sarat further proffers that "[c]ivility is only important to the extent that it facilitates productivity." *Id.* at 815. *See also* Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741 (1988).

[14] *See generally* Sarat, *supra* note 2, at 818-23; David Luban, *The Adversary System Excuse* in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban, ed.).

[15] Sarat, *supra* note 2, at 820.

[16] *Id.* at 819.

[17] *Id.* at 818.

wedding,"[18] rob us of the ceremony, majesty, and formality of litigation. Without such guiding rituals, which serve to check attorney misbehavior, we have lost our sense of purpose, and civility has declined.[19]

We will focus on two areas of litigation, discovery and briefs to the court, because they represent the important and frequent battlegrounds for defining civility in the profession. We will attempt to document the problem, explain it, and suggest some solutions for combating incivility. In exploring the nature and causes of and possible remedies for incivility we must not devolve into smugness or complacency. We must remain open to seeing the "system" as the problem, instead of merely identifying legal and nonlegal cultural artifacts as the cause of incivility. As we examine incivility within the legal profession, we will struggle with defining and resolving the civility crisis.[20]

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[18] Sarah Evans Barker, *Ritual & Civility—What Difference Does a Good "Oyez" Make?*, 39 RES GESTAE 10, 12 (July 1995).

[19] In her discussion of ritual, Judge Barker suggests that "[m]uch of what we currently think of, and frankly treasure, about the judicial process and how it works relates to or arises from the aspects of it that we associate and regard as ritual; we sense at some level that the forms and patterns and approaches and methods we incorporate actually form the glue that holds everything together." *Id.* at 12. As Judge Barker explains, "in the judicial system, judges and lawyers deal with and manage significant amounts of power; this is what we are doing." *Id.* at 15. Barker contends that "unless the exercise of that power is cloaked in forms and processes and rituals which are calculated to provide constant reminders to everybody involved that that's what we're doing—to concentrate the mind on that fact and its implications—the process will degenerate quickly into nothing more than arbitrary power." *Id.*

[20] This "definitional problem" may also be an "ideological problem." Many commentators have suggested, and one of the authors of this piece agrees, that "professionalism is an ideology and a way of describing the political project through which occupations seek control of the market for their services." *See* Sarat, *supra* note 2, at 812-13. Austin Sarat has suggested, that given the elasticity in its definition, "professionalism" becomes "symbolic capital in the clash of cultures among lawyers." *See id.* at 814. In his description of professionalism, Sarat asserts that

> Because it is robust in its credible meanings, it provides the conceptual terrain for status politics within the bar and is used by different interests to claim respectability and legitimacy. Yet, because its meanings are so hard to pin down, it is terrain which can never be confidently secured. Its elasticity means that professionalism can be appropriated and deployed by lawyers representing a wide range of interests and approaches to practice. That elasticity invites the generation of competing 'accounts' of their values and activities by different groups of lawyers. It provides terrain within which justifications, excuses, and explanations can be provided for conduct by one segment of the bar which another finds objectionable.

Id. at 814-15. *See generally* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U.L. REV. 657, 663 (1994) (suggesting that "the organized bars may unconsciously perpetuate the notion that many of the problems confronting the legal profession are attributable to an epidemic of bad behavior among attorneys, because doing so serves the interests of a powerful minority within the profession. That observation compels one to question to what extent the civility codes embody that minority's collective biases. If the skewed perceptions of a privileged few are at the heart of these codes, then they may express flawed values, promote a false community, and constitute potentially dangerous exercises of hierarchical power.").

I. Discovery: Incivility in Depositions

It is not difficult to document "Rambo tactics in litigation."[21] Documents reproduced on smelly paper, coffee purposely spilt at depositions, major litigation events intentionally calendared to maximize inconvenience to the opposing attorney—the stories of attorneys behaving like jerks during discovery are legion. It is no coincidence that the Seventh Circuit's Code of Civility,[22] a groundbreaking document that has spawned many imitations,[23] disproportionately deals with discovery. The Seventh Circuit Code of Civility concerns courtesy and good faith in various scheduling matters,[24] and appropriate behavior in depositions.[25] Of course there is a deep irony in the hyper-adversarial nature of discovery. Discovery was intended to be the great equalizer, the tonic to adversarialism, a time to share rather than to compete.[26] Yet, discovery is where the

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[21] *See generally* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 Hofstra L. Rev. 561 (1996).

[22] Final Report of the Committee on Civility of the Seventh Judiciary Circuit [hereinafter "Final Report"], 143 F.R.D. 441 (1992).

[23] *See, e.g.* Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility*, 74 U. Colo. L. Rev. 1197, 1200-01 (2003); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 278 (1995).

[24] Its provisions include the following:

> 14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.
> 15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.
> 16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.
> 17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.

Final Report, *supra* note 23.

[25] Provisions dealing with depositions include:

> 19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.
> 20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
> 21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.
> 22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

Id.

[26] Indeed, "[t]he very existence of the rules encourages lawyers to use more efficient and economical means to exchange information [including] [*b*]*ilateral* trading of documents, *cooperative* bartering of information, *mutual* alteration of procedures." R. Haydock & D. Herr, Discovery Practice § 1.1 (3d ed. 1996) (quoted

most complaints about incivility arise. The number of ways depositions can go wrong is infinite. To paraphrase Tolstoy, all happy depositions are alike; all unhappy depositions are unhappy in their own way.[27] However, certain patterns emerge.

A. RESISTANCE TO THE RULES OF DEPOSITION OR "DON'T ANSWER THAT!"

Part of the reason for the lack of civility in this area is that attorneys have not fully internalized the rules of depositions, which differ significantly from rules of admissibility at trial, and are at odds with attorneys' client-protective instincts. Hearsay, character evidence, highly prejudicial matters all may be questioned during discovery. The scope of questioning in depositions is much broader than that permitted at trial,[28] and objections to questions at depositions are limited. A party may object for reasons of privilege, relevance, or truly unacceptable, harassing behavior. Any questions reasonably calculated to lead to discoverable evidence are fair game. This means that witnesses (some of whom are clients) may be asked embarrassing questions of marginal relevance, and have to answer them anyway. Attorneys object to what they perceive as fishing expeditions and resent the loss of control over their clients and witnesses.

Even if an objection to relevance is properly made, the correct response is to note the objection for later ruling by the judge, and then have the witness answer the question.[29] Contrary to many attorneys' firmly held beliefs, only in cases of privilege or extreme harassment, may the witness be properly instructed not to answer the question. Therefore, the attorney's instruction to the witness whose deposition she is defending, "Don't answer that," is often wrong, even if heartfelt.

Furthermore, the rules prohibit the coaching of witnesses. As part of the obligation not to coach, objections may not be suggestive.[30] In the Eastern District of New York, the problem of witness-coaching reached a point where a local rule now explicitly forbids attorneys from conferring with witnesses during breaks.[31]

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in GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 10.01 (3d ed. 2002) (emphasis added).

[27] This is, of course, a take on the famous opening of Leo Tolstoy's *Anna Karenina*: "All happy families are alike, all unhappy families are unhappy in their own way."

[28] For example, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). And, "[t]he amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such." FED. R. CIV. P. notes to 1946 Amendment to Subdivision (b).

[29] *See* FED. R. CIV. P. 30 (d).

[30] *See id.*

[31] Local Rule 13 for the United States District Court for the Eastern District of New York, entitled Conferences between Deponent and Defending Attorney, provides: "An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 351, no. 13 (E.D.N.Y. 1984). For another example, Local Rule 30.1 for the United

The rules of discovery and the wide reach of depositions trigger attorneys' natural inclinations to protect their clients' position. Attorneys who have not mastered the rules of discovery are genuinely shocked by the freewheeling nature of depositions. Even where attorneys intellectually understand the rules, they often feel frustrated by what they perceive to be injustice in the deposition process, and engage in "conscientious objection" by flaunting the rules.

A large number of incidents of incivility occur during depositions because the process is predominantly unsupervised.[32] In addition to different standards for drawing out information, the most striking difference between depositions and in-court testimony is the conspicuous absence of the judge. The concern with incivility in the context of discovery gets special notice in the Seventh Circuit's Standards for Professional Conduct. Provision number twenty of the report speaks directly to the unsupervised nature of discovery: "We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge."[33]

B. AD HOMINEM ATTACKS: THE CASE OF JORDAN SCHIFF

The case of Jordan Schiff, a 28-year-old attorney practicing in New York, provides a particularly striking example of the depths to which practicing attorneys will sink to gain a psychological or tactical advantage during discovery. At the same time, this case of gross incivility, using ad hominem attacks to undermine and disparage opposing counsel, highlights the nature and cause of civility's decline.

Jordan Schiff used invective and verbal abuse to destabilize opposing counsel who was taking the deposition.[34] Schiff represented a personal injury plaintiff and was defending her deposition. Elizabeth Mark, counsel for the defendant, was taking the deposition in Schiff's office.[35] Like Schiff, Ms. Mark was three

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States District Court for the Southern District of Indiana, entitled Conduct of Depositions, provides: "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted." Local Rule, S.D. Ind., 30.1 (amended 2000) *available at* http://www.insd.uscourts.gov/publications.htm (last visited Jan. 1, 2004). *See generally* David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike against Witness-Coaching during Depositions*, 40 VILL. L. REV. 1057 (1995).

[32] Discovery disputes are a key arena for incivility because in today's legal universe, discovery is where almost all of the action takes place. Indeed, a recent article in the *New York Times* asserted that only 1.8% of all civil cases filed in federal court end up in trial. Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1. Also, "Legal experts at the National Center for State Courts . . . say the patterns in [state courts] . . . are broadly consistent with those in federal courts."

[33] *See* Final Report, *supra* note 24.

[34] The case was detailed in a 1993 New York Supreme Court Disciplinary Committee Report. *In re Jordan Schiff*, Report and Recommendations of Hearing Panel (N.Y. Sup. Ct. 1993) (No. HP 22/92), reprinted in STEPHEN GILLERS, REGULATIONS OF LAWYERS: PROBLEMS OF LAW AND ETHICS 861-65 (6th ed. 2002). The *Schiff* case also points to a number of ancillary issues as to the decline in civility: (1) the use of gender and sexist commentary to intimidate female attorneys; (2) the oft-cited complaint that much of the growth in uncivil behaviors emanates from a scrappy and unscrupulous plaintiffs' bar; and (3) the potential use and efficacy of discipline in deterring uncivil behavior.

[35] *Id.* at 863.

years out of law school. One of the senior partners in Schiff's firm admonished Ms. Mark, "Your statements are ludicrous," and told her, "You have lost your mind, young lady, continue the deposition or leave."[36] During the attempted deposition, Schiff made many offensive and crude remarks to Mark including: "Enough with the b——s——."[37] Do your examination or I am going to throw you out of the office. B——ch. You are the nastiest person I ever met and I am going to be really all over you during this exam, so you better watch your a——."[38] Off the record, Schiff referred to Ms. Mark as a "c——t" and an "a——h——," advising her that she should "go home and have babies."[39] At no time did Ms. Mark retaliate in kind.

The Disciplinary Committee found that Schiff "chose to degrade and disparage his adversary by using . . . language offensively directed to harass her."[40] Moreover, his comments were part of "an ongoing calculated [pattern of] rudeness intended to intimidate" Ms. Mark.[41] Despite a written apology offered in mitigation, the committee further found that, after a judge criticized Schiff's behavior toward Mark, Schiff engaged in similar conduct, using much the same language in harassing a different female attorney.[42] The committee sustained charges against Schiff for violation of various New York state disciplinary rules,[43] and the appellate division affirmed, concluding that Schiff had been "unduly intimidating and abusive" toward Ms. Mark.[44] In addition to a public censure, Schiff was "put on notice" that any repetition of the conduct "will almost certainly warrant a suspension from practice."[45]

As an initial matter, we concede that Mr. Schiff's behavior was extreme and unusual. Nevertheless, the problem of ad hominem attack is significant, even if the name-calling is slightly less offensive. Schiff's case demonstrates some important issues about ad hominem attacks. It would be impossible to observe such attacks in the courtroom. As mentioned above, incivility becomes of primary concern in discovery because discovery is undertaken without the direct

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36 *Id.*

37 This and all subsequent elisions have been made by the editors.

38 *Id.* at 863-64.

39 *Id.* at 864.

40 *Id.* at 865.

41 *Id.*

42 In a subsequent deposition Schiff referred to another opposing counsel (female) as a "c——t" and a "nasty f——g b——ch." *Id.*

43 (1) DR 7-106(C)(6) ("In appearing before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to the tribunal"), (2) 7-102(A)(1) ("In the representation of a client, a lawyer shall not . . . assert a position, conduct a defense . . . or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another"), and (3) 1-102(A)(7) ("A lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.").

44 *In re Schiff*, 599 N.Y.S.2d 242 (1st Dept. 1993).

45 *Id.* at 243.

supervision of a judge, and because most legal skirmishes begin and end with discovery.

Second, the case of Jordan Schiff demonstrates the importance of mentoring and the influence of partners' behavior within large law firms. Here, a partner in Schiff's firm clearly condoned and participated in these sorts of abusive tactics. Indeed, the disciplinary committee considered the fact that the "firm [had] set . . . a bad example" as a factor in their decision not to seek a harsher penalty. Realistically, law firms may cause as many problems as they solve, especially with the advent of megafirms where associates may feel more pressure to bill, feel more anonymous, and receive less mentoring and ethical training.[46] Professor Sarat has argued that in the current environment, "the ethical ideal of self-discipline and self-regulation" has been subverted and destabilized by the "reality of practice in large firms."[47] Given the hierarchical and unsupervised nature of current large firm practice, new associates are left to fend for themselves in an ethical wilderness, to "figure out for themselves the limits of tolerable behavior."[48]

Finally, the Schiff case highlights the use of incivility and ad hominem attacks as litigation tactics meant to intimidate, frustrate, or confuse one's adversary. In this vein, incivility is "inextricably linked . . . to the adversary system,"[49] in which the "lawyer's amoral ethical role"[50] dictates a "heightened duty of partisanship towards clients and a diminished duty to respect the interest of adversaries and third parties."[51] In the current environment, gamesmanship and "toughness" are the norms, and attorneys are rewarded and exalted for "hard-

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[46] Professor Sarat has noted that "a horizontal, peer-oriented system of social control, in which each lawyer [was] responsible for his or her own conduct and accountable solely to his or her peers within the profession as a whole" is no longer a viable model for analyzing civility in the profession. *See* Sarat, *supra* note 2, at 816-17. Indeed, this model has been replaced by a vertical, hierarchical model, "which expose[s] lawyers to behavioral norms and pressures distinctive" to each individual firm, and where the "demands for loyalty and responsiveness to the explicit directions or the implicit desires of superiors are real and pressing." *Id.* at 817.

[47] *Id.* at 818.

[48] *Id.* at 821. Such an environment highlights the lack of accountability for the contemporary professional behavior of attorneys. The heightened individualism and autonomy that characterizes much of contemporary legal culture has eroded the camaraderie and accountability that defined the earlier periods of American legal culture. Writing of an earlier period De Tocqueville observed that, "[i]n America . . . lawyers . . . form the highest political class and the most cultivated portion of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation . . . that it occupies the judicial bench and the bar." De Tocqueville, *supra* note 9, at 163-64. See also Cochran, Jr., *supra* note 9, at 307-08.

[49] *Id.* at 818.

[50] *See generally* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

[51] *See* Sarat, *supra* note 2, at 818. Sarat thus asserts that "[t]he adversary system . . . excuses lawyers from common moral obligations to nonclients." This development runs directly contrary to the notion cited by Judge Dickson, who, when writing on civility, exhorted attorneys to follow Shakespeare's admonition in *The Taming of the Shrew*: "And do as adversaries do in law, strive mightily, but eat and drink as friends." WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act. 1, sc. 2 (quoted in Brent E. Dickson and Julia B. Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994)).

ball" tactics. Attorneys are often taught to operate on the margins of ethical behavior,[52] and to be as aggressive in their advocacy as possible.

C. OTHER PROBLEMS WITH DISCOVERY: DISTINGUISHING ABUSE FROM ADVOCACY

Discovery illuminates the inherent conflict between zealous advocacy and the potential for abuse. If venom is the weapon of choice for the plaintiffs' bar, delay is the most potent tool of war for the defense. Incivility includes what has been described as "predatory discovery."[53] Such tactics are not meant to uncover information or lead to new theories of liability, but rather are intended, in significant part, to harass, annoy, and delay. Corporate defense counsel, often with "deep pockets," abuse discovery to pressure undefended plaintiffs into premature settlement discussions or, worse, abandonment of just claims.[54]

Given that discovery rules and the process itself provide mechanisms for delay and other potentially abusive tactics, it is extremely difficult to distinguish behavior intended to exploit every advantage in litigation from behavior that is motivated purely by animus or disrespect for the process.[55] Some of the problems associated with over-discovery and tactics of evasion may be systemic to the process itself.[56] Indeed, Judge Easterbrook has commented that "[l]awyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough."[57] Given the facts that the stakes in civil litigation are often extremely high, "[l]awyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish."[58]

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[52] Sarat, *supra* note 2, at 820.

[53] The phrase is from *Marrese v. American Academy of Orthopedic Surgeons*, 726 F.2d 1150, 1164 (7th Cir. 1984), *cited in* Shreve & Raven-Hansen, *supra* note 26, at § 10.12.

[54] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637 (1989). In this formulation, it may be defense counsel who continue to benefit from liberal and expansive discovery—in addition, of course, to the dearth of available sanctions in the event of abuse.

[55] This is particularly true because the Rules of Professional Responsibility offer little guidance. For instance Model Rule of Professional Conduct 3.2 provides that: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The implication is that if efforts to expedite are *inconsistent* with the interest of the client, delay is tolerable.

[56] *See* Shreve & Raven-Hansen, *supra* note 26, at § 10.12 (defining "over-discovery" as "redundant discovery," or "discovery that is disproportionate to the individual lawsuit as measured by its nature and complexity, the amount in controversy, the social significance of the issues, and the relative resources of the parties," and defining "evasion" as "conduct calculated to prevent, distort or stall disclosure of information legitimately sought through discovery.").

[57] Easterbrook, *supra* note 53, at 641 (footnote omitted).

[58] *Id.*

II. Incivility in Brief-Writing

Uncivil language in briefs to the court presents another serious concern.[59] While most such instances involve "hyperbolic barbs"[60] launched against opposing counsel, in at least a few instances, attorneys have been so bold as to attack the integrity of the court.

A. (Not) Tolerating Abuse of Judges: The Case of Michael Wilkins

Michael Wilkins was initially penalized with a 30-day suspension for an attack on the court that appeared in a footnote in a petition to transfer.[61] The footnote, referring to the lower court's opinion, read in part:

> Indeed, the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).[62]

The Indiana Supreme Court ultimately upheld a public reprimand against Wilkins for violating Indiana Rules of Professional Conduct 8.2(a), which provides, "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge."[63] In its per curiam opinion, the court found that the brief "alleged deliberately unethical conduct on the part of the Court of Appeals,"[64] and was filed "with reckless disregard as to the truth or falsity concerning the integrity of a three-judge panel of the Court of Appeals."[65] The court opined that "the use of

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[59] *See* Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

[60] *Id.*

[61] Michigan Mut. Ins. Co. v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1998) (denying transfer). For a detailed report of the events surrounding this case, see Denise G. Callahan, *SC Gains National Attention: Ice Miller Attorney Suspended for 30 days after Brief Criticizes Court*, Indiana Lawyer, Nov. 20, 2002. *See also* Ron Browning, *Wilkins Sanction Eased: Indiana Supreme Court Drops 30-Day Suspension in Favor of Public Reprimand*, Indiana Lawyer, Feb. 12, 2003 & Ron Browning, *U.S. High Court Denies Wilkins Appeal*, Indiana Lawyer, Nov. 19, 2003.

[62] Matter of Wilkins, 777 N.E.2d 714, 716 (Ind. 2002), *modified by* Matter of Wilkins, 782 N.E.2d 985 (2003), *cert. denied*, 124 S. Ct. 63 (2003). The brief further asserted that, "[t]he opinion erroneously and materially misstates the record by making affirmative misstatements regarding the evidence . . . [t]he Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point." *Id.*

[63] The penalty was reduced to a public reprimand on the basis of the facts that (1) Wilkins had made apologies to all judges concerned, (2) Wilkins had maintained an exemplary record while practicing in Indiana, and (3) while Wilkins, by signing the brief, was responsible for its content, the brief was authored by an out-of-state attorney.

[64] *Wilkins*, 777 N.E.2d at 719.

[65] *Id.* at 717.

impertinent material disserves the client's interest and demeans the legal profession."[66]

Wilkins argued that the sanction violated his First Amendment rights. We disagree, but rather than engage on a question of individual rights, we would frame the issue as one of professional obligations.[67] Even if the first amendment protects intemperate judge-bashing, lawyers should not engage in it.

B. INCIVILITY IN BRIEFS: COUNSEL-ON-COUNSEL ATTACKS

Most instances of incivility cited in briefs to the courts concern "rhetorical broadsides" launched by opposing counsel "which have nothing to do with the issues in th[e] appeal."[68] Such "cross-condemnation"[69] is seen with increasing frequency and provides further evidence of the contemporary "erosion in lawyer civility."[70] Invariably, courts find that "such petulant grousing has a deleterious effect on the appropriate commentary in . . . briefs."[71] Such lawyer sniping in briefs is "akin to static in a radio broadcast," and such rhetoric "tends to blot out legitimate argument."[72]

In a talk at a Symposium on Humor and the Law, Judge Kozinski sarcastically advised brief-writers on how to lose an appeal:

> salt your brief with plenty of distractions that will divert attention from the main issue. One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients. No, that's there just to satisfy the case and controversy requirement. What

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[66] *Id. See also* WorldCom Network Servs., Inc. v. Thompson, 698 N.E.2d 1233, 1237 (1998) (striking the offending portions of a brief, including allegations that the court's "decision, if not corrected, 'can only lead to ridicule, if not contempt, for this Court,'" that the court's "decision contains 'glaringly incorrect statements of supposed fact' which are 'obviously wrong,'" and that the "decision give[s] 'the appearance of bias, prejudice and impropriety.'").

[67] If any progress can be made to restoring civility in the legal profession, such an argument should be vigorously discredited. The bounds of legitimate argument and behavior in legal proceedings have, since time immemorial, been defined in terms of valid time, place, and manner restrictions. The requirement of candor to the tribunal, for example, in extrajudicial contexts might be seen as a violation of the First Amendment. For a discussion of this issue, see W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001).

[68] Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992). Judge Conover went on to say that "the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal." *Id.*

[69] *Id.* at 351.

[70] *See* Dickson & Jackson, *supra* note 50, at 531.

[71] *Amax Coal*, 597 N.E.2d at 352.

[72] *Id.*

> is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent.[73]

Indeed, judges are agreed that attorneys' unnecessary and irrelevant attacks on each other distract the judge from the issue at hand, and reflect poorly on the offending attorney.

Judicial admonitions against incivility in briefs stand in stark contrast to the unsupervised nature of discovery, where abuses, gross or at the margins, are either invisible to the judiciary or ignored. The evidence of disciplinary sanctions as well as the oft-used remedy of striking the offending portions of the brief from the record,[74] suggest that remedies are available and in use to correct abuse and incivility in briefs.

Elimination of obnoxious personal attacks in briefs is probably a quintessential example of "good" lawyering in both senses of the word: competent and moral. The use of invective, whining, and other unpleasantries about opposing counsel is so clearly unproductive that one is prompted to wonder why attorneys engage in it at all. We speculate that ego and attorney over-involvement in the competition with opposing counsel best explain its persistence. Interestingly, in other contexts such as misbehavior at depositions, some excuse incivility on the debatable grounds that it is effective. (Obviously the effectiveness of a method does not justify it, but intimidation and delay do sometimes "work.") Incivility in a brief, however, is never effective, raising the question of how much the "hard-ball" tactics reflect the attorneys' emotional needs and shortcomings, rather than concern about their clients' interests. When civility is understood as in the best interest of the client, and attorneys educate clients that one can be tough without being uncivil, we can hope for an improvement in legal dialogue, behavior, and the tone of briefs submitted to courts.

III. The Search for Solutions

Having documented incivility in discovery and in brief-writing, the obvious question is: what can the profession do to ameliorate the problem? Volumes have been written on the subject and we will not duplicate here the many suggestions, which range the gamut from creative, to impractical, to dumb. We note that judges have at their disposal various formal mechanisms to enforce not only ethical rules, but also civility. Judges retain "inherent contempt powers" to discipline and officiate within their courtrooms, and possess numerous controls under procedural rules. For example, Federal Rule 37 provides mechanisms for a judge to compel cooperation in matters of discovery. Federal Rule 11 provides sanctions for ad hominem attacks or gross incivility.[75] Federal Rule 12(f) per-

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[73] Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 328 (1992).

[74] Indeed, "[s]triking scandalous or impertinent material has been a part of Indiana practice since long before adoption of our present trial rules." State v. Hoovler, 673 N.E.2d 767, 768 (Ind. 1997).

[75] Sanctions under Rule 11 for incivility find their basis in Fed. R. Civ. P. 11(b)(1), which prohibits representations to the court "presented or maintained for any improper purpose, such as to harass or to cause unneces-

mits the court to strike "impertinent" or "scandalous matter."[76] Title 28 section 1927 of the United States Code holds liable for costs those counsel who in bad faith delay "unreasonably and vexatiously."[77]

Because incivility often overlaps unethical conduct, the disciplinary rules provide another formal mechanism for dealing with incivility, at least in egregious cases. In Indiana, courts have repeatedly cited Indiana Professional Conduct Rule 8.2 to uphold sanctions where "the state's interest in preserving the public's confidence in the judicial system and the overall administration of justice . . . outweigh any need" for the attorney to disparage the integrity of the court.[78]

There is much attorneys can informally and voluntarily do to promote civility.[79] Much has been written on voluntary civility codes,[80] Inns of Court,[81] and

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sary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). *See generally*, Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283 (1996). *See also* Coats v. Pierre, 890 F.2d 728, 734 (5th Cir. 1989, *cert. denied*, 498 U.S. 821 (1990) (concluding that "[a]busive language toward opposing counsel has no place in documents filed with our courts: the filing of a document containing such language is one form of harassment prohibited by Rule 11.").

[76] *See* FED. R. CIV. P. 12(f). For examples of the use of such a tool in Indiana, see *Michigan Mut. Ins. Co. v. Sports, Inc.*, 698 N.E.2d 834 (Ind. Ct. App. 1998) and *WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233, 1237 (1998).

[77] 28 U.S.C. § 1927

[78] *See* Matter of Wilkins, 777 N.E.2d 714, 717 (Ind. 2002). *See also* Matter of Garringer, 626 N.E.2d 809, 813 (Ind. 1994) (noting, as to Prof. Cond. R. 8.2, that "the duty violated by the Respondent was his obligation to refrain from acting in a way that damages the integrity of the judicial system."). Indiana Professional Conduct Rule 8.2 reads, in relevant part, that: "(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

[79] Some are skeptical that law firms, which contribute to the civility problem, can solve it. Professor Sarat, has sounded a pessimistic note concerning the role of firms in promoting anything akin to a uniform vision of professionalism. Professor Sarat writes:

> Firms are too large, segmented, and structured to maximize lawyer independence to sponsor a single set of values except at the most general level. Even if firm cultures do exist, they do not seem to be geared toward policing the everyday, often subtle, choices that lawyers make about their practice styles. Socialization seems too incomplete and social control in large firms seems too deferential, except when confronted with gross violations of clear ethical norms, to ensure uniformly admirable enactments of professionalism.

Sarat *supra* note 2, at 827-28.

[80] *See infra* notes 23-25 and accompanying text.

[81] Inns of Court are communities of judges, lawyers, academics, students, and other legal professionals organized for the express purpose of fostering civility and professionalism through interaction between the various segments of the bar. The stated mission of the AIC [American Inns of Court] is "to foster excellence in professionalism, ethics and legal skills for judges, lawyers, academicians, and students of law in order to perfect the availability and efficiency of justice in the United States." Mission of the American Inns of Court, *available at* http://www.innsofcourt.org/contentviewer.asp?breadcrumb=6,9,340 (last visited Jan. 7, 2003). For anyone generally interested in AICs, their official web site, http://www.innsofcourt.org/ is the best and most comprehensive repository of information. *See also* Joryn Jenkins, *The American Inns of Court: Preparing Our Students for Ethical Practice*, 27 AKRON L. REV. 175, 179 (1993) (hailing Inns of Court as "one constructive response" to the "crisis" in civility, and a response that represents a "uniquely cooperative effort" by typically disengaged segments of the bar); Hugh Maddox, *An Old Tradition with a New Mission[:] The American Inns of Court*, 54 ALA. LAW 381, 382 (1993) (suggesting that "[t]he reason for the AIC movement's phenomenal growth is probably the result of the passion that judges and lawyers have for their legal profession, and their

mentoring within law firms.[82] All of these are important but are not the focus of our attention here. The institution of an ombudsman is one measure that might improve standards of professionalism within large law firms. Such positions have been created and utilized with increasing frequency in the newspaper business to insure integrity in reporting.[83] An equivalent position in legal culture might be charged with responsibility for continuing legal education and training in civility and professionalism.[84]

Another possible self-regulatory change that might enhance civility would include civility in the admissions process. As part of admission to the bar, would-be attorneys could confirm their adherence to basic civility as part of their professional oaths. Currently, the Attorney's Oath in Indiana does touch on two aspects of civility. The attorney swears that: "I will maintain the respect due to courts of justice and judicial officers."[85] In addition, the attorney promises to "abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged."[86] As with the rules on delay, the exception seems to swallow the rule. More emphasis on civility in the oath might be useful, because taking the Attorney's Oath is a serious, momentous occasion in a lawyer's life. It is part of ritual and majesty that support civility. The Oath of Attorneys could be elevated in status and renown, akin to the physician's Hippocratic oath. Although merely a symbolic gesture, greater focus on civility in the Oath could be a powerful affirmation of our shared values.

We are skeptical, however, of the utility of some of the formal solutions, especially the "top-down" mechanisms. Rules or sanctions promulgated in a vacuum and imposed from above are too likely to be ignored or viewed as the power exercises of elite minorities within the profession. A program developed to counteract the decrease in civility within the profession must be comprehensive and inclusive, inviting all members of the bar into the conversation.[87]

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desire to recapture the professionalism that was so prevalent in the profession in the past."); Dickson, *supra* note 50, at 539 (asserting that "[t]he personal relationships forged in AIC units enable values of professional civility to be transmitted in ways not otherwise available, particularly in areas characterized by numerous competing attorneys and ever-larger law firms."). *But see* Atkinson, *supra* note 23, at n.86 (citing articles where commentators expressed concern about the exclusivity of Inns of Court.).

[82] *See supra* notes 47-51 & *infra* note 87 and accompanying text.

[83] *See, e.g.*, Mark Jurkowitz, *Eyes on the Times Ombudsman Dan Okrent Will Be Watching the Paper—and People Will Be Watching Him*, BOSTON GLOBE (Dec. 4, 2003, Thursday, Third Edition, B14, 1573).

[84] To be genuinely effective, such an ombudsman might need to be separate from any internal committee charged with investigating ethical violations.

[85] Oath of Attorneys, Rule 22, Indiana Rules for Admission to the Bar and the Discipline of Attorneys.

[86] *Id.*

[87] In this sense, "[t]he legal profession is [like] a very powerful and autonomous patient" that must be healed from within, both because of its self-regulatory nature as well as its monopoly on the provision of legal services more generally. *See* Mashburn, *supra* note 20, at 660. *See also* Cochran, *supra* note 9, at 314-15. In his discussion of the implications of a changing bar Professor Cochran writes that, "[w]ith a more diverse profession has come the loss of a common moral vision. It may be, however, that the key to renewed virtue in lawyers is to look within that diversity for moral insight. The very thing that caused the death of the old professionalism

In our final section we focus on aspects of creating a civil bench and bar that are more informal, more reflective of who really trains lawyers, and less subject to the rule-based solutions. We will look to two actors whose roles in affecting attorney civility are sometimes unappreciated: judges and law professors.

B. JUDGES AS MENTORS AND MODELS OF CIVILITY

Without the complete commitment of the judiciary, any hope for promoting civility within the profession is futile. As mentioned above, judges possess formal mechanisms, procedural and managerial tools to monitor and control the civility of the court proceedings. Judge can and do punish incivility. Just as important, however, is the role judges play in modeling civility. Judges can teach civility by example in their written opinions and their judicial temperament, both in court and in case-management.[88]

By assuming a more active and instructional role in individual case management, judges can address attorney incivility. Attorneys who believe that a particular judge has little interest in monitoring discovery, or is unwilling to entertain or get involved in disputes between the parties, may be more willing to push the boundaries of civil behavior. Such attorneys will feel confident that the likelihood of judicial intervention, never mind sanction, is virtually nil.[89] In addition, judges have tremendous power to informally influence future behavior within their courtrooms merely through the judicious use of language—in chambers, at trial, or in written opinions. By making it clear at the outset that they will brook no incivility, judges have enormous power to set a good tone. Sometimes parties attempt to grandstand in making or resisting discovery motions—warming up the judge for the future litigation. Judges can manage such waste of time and unnecessary drama by expressing displeasure, keeping litigants to agreed-upon discovery schedules, and where necessary, assigning discovery disputes to a magistrate or special master where party incentives to grandstand would be less. For example, at the conclusion of his discussion regarding incivility in the briefs before him, Judge Conover asserted that, "[i]n sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs."[90] This helps set the tone for future Indiana appellate briefs.

One negative trend in this regard involves vituperation among members of judicial panels. Justice Scalia, in particular is known for issuing verbal attacks

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may provide a possibility for moral renewal. . . . We should encourage [legal] . . . communities to develop moralities (and theologies) of lawyering. It may be that from the particular traditions of those within the profession will emerge ways of lawyering that will transform not necessarily the whole profession, but the way that significant groups of lawyers practice."

[88] At all levels of the judiciary, judges "[b]y modeling intemperate behavior, merely invite more of the same from the lawyers in [their] . . . court and beyond." Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 14 (2001) (asking "why should lawyers be polite when the court itself insults and demeans them [and each other]?").

[89] *See, e.g.*, Chudasama v. Mazda Motor Corp., 123 F.3d 1353 (11th Cir. 1997) (Judge Tjoflat takes the district court judge to tasks for failing to manage the case and limit plaintiff's outrageous discovery requests).

[90] Amax Coal Co. v. Adams, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

against his cojustices (although he is not the only example on the U.S. Supreme Court[91] or from the bench[92]). For example, in *Webster v. Reproductive Health Services,* Justice Scalia referred to a dissenting opinion of Justice O'Connor as "perverse,"[93] and "irrational,"[94] and stated that "it cannot be taken seriously."[95] More recently, Justice Scalia suggested that the majority's handling of constitutional doctrine was "manipulative,"[96] "[in]consistent,"[97] and, Scalia claimed, "so out of accord with our jurisprudence . . . that it requires little discussion."[98] Justice Scalia's "hyperbolic barbs" from the bench are particularly troubling because his opinions emanate from the most powerful court in the nation, become part of the material used to educate and instruct future generations of lawyers, and foster disrespect.

Another form of judicial incivility in current legal culture involves abuse of lawyers in judicial opinions. A notable, and now notorious (thanks to the Internet) example of such intemperate judicial behavior is an opinion by Samuel B. Kent, a federal judge sitting in the Southern District of Texas. Judge Kent has become famous for his abusive and demeaning attacks on attorneys in his judicial opinions.[99] In critiquing the inadequacy of the briefing in a summary judgment before him, Just Kent wrote a simultaneously withering and whimsical account:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by

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[91] *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J. dissenting) ("Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion.").

[92] *See generally* Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 VAL. U.L. REV. 583 (1994).

[93] *Webster*, 492 U.S. at 534 (Scalia, J. concurring).

[94] *Id.* at 536 (Scalia, J. concurring).

[95] *Id.* (Scalia, J., concurring).

[96] Lawrence v. Texas, 123 S. Ct. 2472, 2488 (2003) (Scalia, J. dissenting). The doctrine at issue was the doctrine of stare decisis. Justice Scalia later asserts that the majority has "laid waste the foundation of [the Court's] . . . rational-basis jurisprudence." *Id.* at 2497 (Scalia, J. dissenting).

[97] *Id.* at 2488 (Scalia, J. dissenting).

[98] *Id.* at 2495 (Scalia, J. dissenting).

[99] *See, e.g.*, Bradshaw v. Unity Marine Corp., Inc., 147 F. Supp. 2d 668 (S.D. Tex. 2001); Labor Force, Inc. v. Jacintoport Corp. & James McPherson, 144 F. Supp. 2d 740 (S.D. Tex. 2001) (Withdrawn for N.R.S. bound volume, 2001 WL 640675 (S.D. Tex.)) (see pdf of original opinion at www.greenbag.org; last visited Jan. 5, 2003); Massey v. State Farm Lloyds Ins., Inc., 993 F. Supp. 568 (S.D. Tex. 1998).

> their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.[100]

Such scathing ridicule from the bench raises a number of significant questions. As Professor Lubet pointed out, the losing party could wonder whether he received a fair hearing upon reading such an evaluation of his attorney by the judge.[101] In addition, one could question "the quality of justice being dispensed."[102] Furthermore, given such an atmosphere, lawyers might be tempted to "pull their punches for fear of incurring Judge Kent's ire,"[103] resulting in less rigorous representation of clients and the potential for a corresponding loss of justice for society. Not least of all, attorneys will imitate such discourse. A first-year student at Indiana University-Bloomington raised this question after reading *Bradshaw*, asking how lawyers could constantly be exhorted to be civil, when judges, or at least the judge in *Bradshaw*, clearly was not.[104]

All of these examples affirm the fundamental role of judges in promoting civility. If judges fail to recognize the power and impact of their opinions on those seeking justice—and the respect that must accompany that recognition—they will subvert civility, nurture intemperance, and foster hostility within the profession.

C. LEGAL EDUCATION

Any attempt to promote civility in the legal profession must include as its primary initiative a reinterpretation and promotion of professionalism within our law schools. Lawyers are educated by partners and by judges. But first and foremost, lawyers are introduced into the profession and inculcated with its values in law school.

Consciousness about civility should begin at the same time professional identity begins: in law school. There are many ways law schools could communicate the importance of civility. Obviously, professors can lecture about it and schools could include civility in their curricula. But as with judges, the most effective method of transmitting the importance of civility will be by example. Specifically, professors must beware that in preparing students for the rigors of law practice—careful preparation, precise articulation, reasoned thought, quick abil-

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100 *Bradshaw*, 147 F. Supp. 2d at 670. Judge Kent went on to say that he had resolved "what [the court] perceived to be the legal issue presented" merely "out of [his] own sense of morbid curiosity." *Id.* at 672.

101 *See* Lubet, *supra* note 87, at 15.

102 *Id.*

103 *Id.* Professor Lubet has cautioned that "[n]o matter what the merits or their positions, lawyers will obviously have to tread softly in Judge Kent's courtroom." *Id.*

104 The student, Dwight L. Haygood, Jr., Class of 2006, presaged Professor Stephen Lubet's critique.

ity to answer questions—the atmosphere in the classroom does not become cruel or callous. Being intellectually demanding does not mean being rude or dismissive.

Law professors need to be demanding of students not just intellectually but also professionally, requiring attendance, promptness, courtesy, and adherence to deadlines. Law professors can model how to disagree strongly without ad hominem attack or snide rhetoric. Of course, to accomplish this, professors must not do these things themselves. Professors must conduct their conversations with students civilly, arrive on time to class, and finish grading exams according to the agreed-upon schedule. At their best, professors illuminate the majesty of law and energize students for the professional challenges ahead; at their worst, professors haze students in an unfair game of "gotcha" that sets the stage for future incivilities.

Whatever reforms are undertaken in legal education, the discussions and promotion of those values must include the students. Students must be allowed to speak and be heard concerning their own understanding and aspirations for a civil profession. To paraphrase Justice Jackson, because we are educating attorneys for citizenship within a noble profession, we must exercise "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our [profession] as mere platitudes."[105] Only through modeling and including civility in the legal curriculum will the profession move beyond a purely symbolic allegiance to civility and achieve a more lasting commitment to true professional interactions among the bench and bar.

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[105] West Va. State Bd. Edu. v. Barnette, 319 U.S. 624, 637 (1943). In a similar vein, Professor Cochran has written that "law students need to be challenged to think about the implications of their own moral traditions on their lives as lawyers. Morality is more likely to take hold and to affect one's life when it is drawn not from the ethical considerations of the profession, but from the deepest source of values of a person. Traditions need to struggle with the implications of their teachings for the practice of law; the bar and law schools need to encourage and enable them to do so." Cochran, *supra* note 8, at 318.